

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 26**

In the Matter of:

GGNSC SPRINGFIELD LLC D/B/A
GOLDEN LIVING CENTER -
SPRINGFIELD

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

Case No. 26-CA-072684

**RESPONSE TO GENERAL
COUNSEL'S MOTION FOR
SUMMARY JUDGMENT AND TO
NOTICE TO SHOW CAUSE**

In accordance with the Order Transferring Proceedings to the Board and Notice to Show Cause, dated February 29, 2012, the Respondent, GGNSC Springfield LLC d/b/a Golden Living Center – Springfield (“GGNSC Springfield”) submits this memorandum in response to General Counsel’s Motion for Summary Judgment.

GGNSC Springfield acknowledges that it has refused to bargain with the International Association of Machinists and Aerospace Workers, AFL-CIO (the “Union”) and that it wishes to test the Board’s certification of the Union as the collective bargaining representative for certain GGNSC Springfield employees. The basis for GGNSC Springfield’s refusal to bargain is that the Union was erroneously certified in Case 26-RC-067840, because the Employer’s Registered Nurses (hereinafter “RNs”) are supervisors within the meaning of Section 2(1) of the National Labor Relations Act (the “Act”).

In support of GGNSC Springfield's position that its RNs are supervisors, and thus should be excluded from the bargaining unit, GGNSC Springfield hereby incorporates by reference the Brief on Behalf of GGNSC Springfield LLC d/b/a Golden Living Center – Springfield, submitted on November 16, 2011, and attached hereto. GGNSC Springfield also refers the Board to Extendicare Health Services, Inc. v. NLRB, 182 Fed. Appx. 412 (6th Cir. 2006), which is squarely on point supporting the conclusion that the RNs are supervisors under the Act. For the reasons set forth therein, the Board should deny the General Counsel's Motion for Summary Judgment and hold that the Respondents have not violated Section 8(a)(1) and (5) of the Act due to the inappropriateness of the bargaining unit.

Briefly, GGNSC Springfield asserts that its RNs possess (and exercise) supervisory authority and that they exercise independent judgment. The RNs have the authority to counsel and discipline employees, evaluate and reward employee performance, adjust grievances, and assign/direct the employee work. They are also held out as supervisors. The possession of merely one indicia of supervisory status by the Employer's nurses is sufficient under Section 2(11) of the Act to establish supervisory status. Albany Medical Center Hospital, 273 NLRB 485 (1984); see also Extendicare Health Services, Inc. v. NLRB, 182 Fed. Appx. 412 (6th Cir. 2006). Even the mere possession of supervisory authority is enough to establish supervisory status. Cox Enterprises, Inc., d/b/a Atlanta Newspapers, 263 NLRB 632 (1982); Exeter Hospital, 248 NLRB 377, 378 (1980); Hook Drugs, Inc., 191 NLRB 189, 191 (1971).

The Employer's RNs, therefore, are supervisors within the meaning of Section 2(1) of the Act and should be excluded from the bargaining unit. As such, the Respondents have not violated the Act by refusing to recognize or bargain with the Union. The General Counsel's Motion for Summary Judgment, therefore, should be denied.

Respectfully submitted,

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Dated: March 14, 2012

AFFIDAVIT OF SERVICE

It is hereby certified that a copy of the foregoing **RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND TO NOTICE TO SHOW CAUSE** was served on March 14, 2012, via electronic mail, on:

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s\Charles M. Roesch
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EXHIBIT 1

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

**GGNSC SPRINGFIELD LLC d/b/a
GOLDEN LIVINGCENTER-SPRINGFIELD,**

Employer,

and

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO,**

Petitioner.

Case No. 26-RC-067840

EMPLOYER'S POST-HEARING BRIEF

Pursuant to the Rules and Regulations of the National Labor Relations Board ("the Board"), GGNSC Springfield LLC d/b/a Golden LivingCenter–Springfield in Springfield, Tennessee (the "Employer" or the "Home") urges a finding that the Employer's Registered Nurses (hereinafter "RNs", "Charge Nurses", or "CNs") are *Supervisors* within the meaning of Section 2(11) of the National Labor Relations Act, as amended (the "Act").

**I. THE RECORD EVIDENCE COMPELS THE FINDING
THAT THE EMPLOYER'S RNs POSSESS
AND EXERCISE SUPERVISORY AUTHORITY**

A finding that the Employer's RNs are supervisors within the meaning of the Act is supported by the record evidence. The RNs not only possess, but exercise supervisory authority.

A. The Employer's Position.

The Employer's RNs satisfy the statutory criteria for supervisory status as set forth in the Act. The record shows that the RNs possess supervisory authority and can exercise independent judgment by, *inter alia*: (1) counseling and disciplining employees; (2) evaluating and rewarding

employees' performance; (3) adjustment of grievances; and (4) assigning and directing the work of employees. Moreover, the Employer's RNs are held out as supervisors.

B. Statement of the Facts.

1. The Home.

Golden LivingCenter-Springfield is a skilled nursing home in Springfield, Tennessee.

The primary business of the Home is to care for its residents and the elderly.

2. Managerial Structure and Operation.

At the top of the Nursing Department primary care hierarchy is the Director of Nursing ("DON"). The applicable structure and chain of command then follows with the two Assistant Directors of Nursing ("ADONs"), the 3-11 Nursing Supervisor and/or Charge Nurses, and then the Certified Nursing Assistants (CNAs).

The Home is a 24 hour facility with 24 hour coverage on two wings, East and West. Upper nursing management (the Director of Nursing and two ADONs) are present at the facility mainly Monday through Friday during the day and early evening. During the remaining hours of operation, the highest ranking or highest level personnel in the building is the 3-11 RN Supervisor (until 11:00 pm on weekdays) and/or the RN Charge Nurses (E-3).¹ However, the 3-11 RN Supervisor position was created to assist with handling new resident admissions (t-22-23). Charge Nurses are required to monitor the CNAs (t-23). RN Charge Nurses are regularly the highest ranking person at the facility from 11:00 pm - 7:00 am on weekdays. For weekends, RN Charge Nurses will be rotated into a Nursing Supervisor position like the weekday 3-11 Nursing Supervisor position (t-22). Representative 24 hour deployment assignments sheets for Sunday, November 6, 2011, and Monday, November 7, 2011, show that on Sunday the only RN Charge Nurses scheduled were

Vazquez, Hunter, and Jones from 6:45 pm - 7:15 am for the facility and day; and for Monday only RN Charges Nurses Vasquez, Holman, and Jones were scheduled for that day and were to work 6:45 pm - 7:15 am (E-3).

C. The Record Evidence Justifies the Finding that the Employer's RN's Possess and Exercise Supervisory Authority.

Under Section 2(11) of the Act, the term "supervisor" is defined as follows:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. Section 152(11)

It is well-settled that the possession of any single indicia of supervisory status by the Employer's nurses would be sufficient, under Section 2(11) of the Act, to establish supervisory status. Albany Medical Center Hospital, 273 NLRB 485 (1984). As discussed below, the Employer's RN Charge Nurses possess and exercise supervisory authority.

1. RNs Have the Authority to Counsel and Discipline CNAs.

The record evidence established that RNs have the authority to issue discipline to CNAs and LPNs (E-9). The RN Charge Nurse completes, presents, and signs discipline (t-35-36, 102). RN's can issue discipline to both CNAs and LPNs (t-37). It is within an RNs discretion to decide to orally counsel or to issue a written memoranda (t-38, 68-70; E-8). How the CN decides to address conduct or performance issues, even if she exercises her independent discretion by only doing an oral counseling, has an effect upon the CNAs who report to her.

¹An "E" denotes employer exhibit, and "t" denotes transcript page.

Written warnings do effect the employment of the CNAs or LPNs to whom issued. They have resulted in the suspension of a CNA for example (t-103-105). Four written warnings can result in termination (E-2, 11, 12). Three written warnings result in the CNA or LPN being ineligible for a merit increase (t-56, 58; E-18). CNA Vanessa Starks was ineligible for a merit increase in 2010 because she had three written warnings in her personnel file (E-18, t-58).

2. RNs Complete Annual Performance Evaluations for LPNs and CNAs.

The Charge Nurses complete, sign, and present annual evaluations to CNAs (t-47, E-13, 14). RN Charge Nurses also evaluate LPNs (t-47, E-15). Notably, in the evaluation of LPN Elizabeth Ann Blair in April 2011 by RN Charge Nurse Vicki Jones, Blair comments that she works “under” the RNs (E-15). The evaluation form for Charge Nurses is the “Management Position” form and the form for CNAs is the “Hourly Position” form (E-15, 14). Annual evaluations are considered for determining annual merit increases for employees (t-55, 57-58, 60; E-17, 18, 19).

3. RNs Have the Authority to Adjust Grievances of the CNAs.

The Company provides a procedure for employees with complaints or grievances. Employees are to present those to their supervisor (E-2). For CNAs, that would be their Charge Nurse (t-51-52). Such grievances have included complaints about being assigned too many residents to care for. CNAs are assigned a certain number by the Charge Nurse depending on the residents’ acuity. RN Charge Nurses are permitted to make those assignments and to modify them as they determine (t. 51-52; 74).

4. RN Charge Nurses Have the Authority to Assign and Direct the Work of the CNAs.

CNs assign the CNAs the residents they are to care for as well as special assignments like showers, etc. (E-16, t-50-51).

CNs have the authority to call in replacement employees to cover absences. They are not required to call employees in any particular order (t-50-51).

CNs are permitted to determine whether CNAs can leave early, stay over, or work through meals (t-26-27).

CNAs are assigned a certain number of residents by the Charge Nurse depending on the residents' acuity. RN Charge Nurses are permitted to make those assignments and to modify them as they determine (t. 51-52; 74).

5. The Employer's RN Charge Nurses are Held Out As Supervisors.

The job descriptions for the CNAs and RN Charge Nurses reflect the role of the Charge Nurse as supervisor (E-6, 7). A number of RN Charge Nurses have also signed off on such acknowledgments (E-8). Postings at the facility are used to communicate and reinforce the supervisory role of the Charge Nurses (E-4). RN Charge Nurses are paid more than LPN Charge Nurses and CNAs (E-18). RN Charge Nurses have access to Employer information on labor relations and are trained thereon annually (t-127). RN Charge Nurses also receive supervisory training annually (t-103).

**II. THE LAW COMPELS FINDING THAT
THE EMPLOYER'S RN's ARE SUPERVISORS**

The Employer's RN Charge Nurses possess numerous attributes of Section 2(11) and Board law compels the finding that they are statutory supervisors. As discussed below, Board

law has found that individuals with *less* supervisory authority than the Employer's nurses are indeed statutory supervisors. The same result should be obtained here.

The Board has repeatedly reiterated that the statutory indicia set forth in Section 2(11) of the Act must be read in the disjunctive. Albany Medical Center, 273 NLRB 485, 486; Research Designing Services, Inc., 141 NLRB 211, 213 (1963). In Albany Medical Center, *supra*, the Board stated that "the statutory indicia set forth in Section 2(11) of the Act are stated in the disjunctive and *only one need exist to confer supervisory status*." 273 NLRB at 486 (emphasis added). In fact, the mere possession of supervisory authority -- whether or not it is actually exercised -- satisfies the statutory criteria. Cox Enterprises, Inc., d/b/a Atlanta Newspapers, 263 NLRB 632 (1982). Exeter Hospital, 248 NLRB 377, 378 (1980). In Hook Drugs, Inc., 191 NLRB 189, 191 (1971), the Board found the law to be:

[W]ell settled that a supervisor retains his supervisory status *regardless of whether he actively exercises his supervisory powers. It is the existence of the power which determines his status.*

Id. at 191 (emphasis added, citations omitted). *Accord*, Cox Enterprises, Inc., *supra*, at 633 (route managers found to be supervisors despite the fact that "some route managers do not exercise the full extent of their authority"); Exeter Hospital, *supra*, at 377-78 (nurses possessed authority to consider and grant requests for time off, entertain grievances, and discipline employees).

In the instant case, the Employer's RN Charge Nurses do possess supervisory authority and have exercised some of that authority.

A. The Authority to Discipline CNAs and LPNs Satisfies Section 2(11).

The Board has repeatedly recognized that possession of the authority to discipline employees satisfies the statutory test of Section 2(11). The Employer's RNs possess the authority to discipline employees. That alone could end this inquiry. In Pine Manor Nursing Home, 270 NLRB 1008, 1009 (1984), nurses who possessed the authority to issue discipline, and exercised it through *verbal* disciplinary warnings, were found to be supervisors. *Id.* at 1009 (*citing*, Wedgewood Health Care, 267 NLRB 525 (1983); and Northwoods Manor, 260 NLRB 854 (1985).

The Employer's RN Charge Nurses may effectively decide to use oral counselings rather than written warnings. That is within their independent discretion to decide. If they choose to issue written warnings, these can result in termination or being ineligible for merit increases. Since the Employer's RN Charge Nurses possess authority to discipline and can enforce the Home's policies, Board law requires a finding that they are statutory supervisors. See also Cox Enterprises, 263 NLRB 632 (1982) and Rest Haven Living Center, 322 NLRB 210 (1966).

B. The Annual Evaluations Prepared by RN Charge Nurses Establish Their Supervisory Status.

Board law is clear – Charge Nurses will be treated as supervisors based upon their role in performing evaluations of CNAs if the evaluations directly affect the CNAs' employment status. The Board in First Healthcare, 323 NLRB No. 202 (1997), concluded the LPNs at issue in that case were supervisors based upon their role in preparing CNA evaluations that directly affected the CNA's employment status. The Charge Nurses there, as in this case, completed annual evaluations. The LPNs met with the CNAs to review the evaluations. Further, although

the evaluations were signed by the higher management, there was no evidence that higher management independently investigated or changed the evaluations completed by the LPNs.

First Healthcare. As stated by the board in Nymed, Inc. d/b/a Ten Broeck Commons (Ten Broeck Commons), 320 NLRB 806, 813 (1996):

The Board has consistently found that LPNs are supervisors when they independently perform evaluations of other employees which lead directly to personnel actions affecting those employees....

In Ten Broeck Commons, the Board found that the LPNs were not supervisors. However, in Ten Broeck Commons, the LPNs repeatedly changed any evaluations to conform with their nursing supervisor's opinion. 320 NLRB at 813. Also, the nursing supervisors reviewed the evaluations and changed grades previously assigned by the LPNs. Id. Obviously, Ten Broeck Commons is distinguishable from the present case. The Employer's RNs on their own perform the annual evaluations of CNAs. The RNs independently decide which scores a CNA should receive, what comments they will write in the sections provided on the form, and whether or not the CNA has met, exceeded or needs improvement in certain areas. The RNs then present the evaluation to the CNA and have them sign.

The annual evaluations affect the employment status of the CNAs in regard to merit or performance increases and confer supervisory status on the RNs. See Bayou Manor Health Center, 311 NLRB 955 (1993).

C. The Authority to Adjust Grievances Compels a Finding of Supervisory Status.

The Employer's policies and employee handbook provide a procedure for problem resolution (E-7, 8, 14). In Passavant Retirement & Health Center, 149 F.3d 243 (3rd Cir. 1998),

the Court determined that even the adjustment of minor oral complaints amounted to “adjustment of grievances” under the National Labor Relations Act. The Employer’s RNs adjust minor oral complaints and more serious complaints through the problem resolution procedures. If not resolved by the Charge Nurse, these formal grievances can be appealed to the higher authority in accord with the written procedures.

The Board has consistently held that the adjustment of employee grievances is a clear indicator of supervisory status. In Paintsville Hospital Company, Inc., 278 NLRB 724, 740 (1986), the Board stated: “The authority to adjust grievances is sufficient under Section 2(11) of the Act to establish supervisory status.” See also Wright Memorial Hospital, 225 NLRB 1319, 1320 (1980) wherein the Board noted the RN charge nurses who possessed the authority to adjust employee complaints or grievances are supervisors.

D. The Authority to Assign and Direct Associates Is An Indicia of Supervisory Status.

The RNs are statutory supervisors since they "meaningfully" monitor, direct and assign work sections and assignments to the CNAs on a daily basis. See, Pine Manor Nursing Center, 270 NLRB 1008 (1984); Opelika Foundry, 281 NLRB 897(1986); Lincoln Lutheran of Racine, Wisconsin, Inc., 290 NLRB 1077 (1988); Maine Yankee Atomic Power, 624 F. 2d 347(4th Cir.1980); and Caremore, Inc. v. NLRB, 150 F.3d 628 (6th Cir. 1998).

III. CONCLUSION

In Bridgeport and Port Jefferson Steamboat Company, 313 NLRB 542 (1993), the Board recognized that the general rule is that employers are entitled to make their own nondiscriminatory decisions as to how best to supervise their operations; and as the trier of fact,

the Board, may not simply substitute its own subjective judgment of what it would have done were it in the employer's position. The Employer's decision to have its RN Charge Nurses function as part of its management team in the highly regulated, demanding, and litigious business of patient care should not be second guessed.

For all the foregoing reasons, the law and facts in this case compel the conclusion that the Employer's RNs are supervisors within the meaning of the Act. Accordingly, they should be excluded as a matter of law and the petition should be dismissed.

Respectfully submitted,

By: _____
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Dated: November 16, 2011

CERTIFICATE OF SERVICE

I, Keith R. Jewell, hereby certify that copies of the foregoing Employer's Post-Hearing Brief were this date served upon the following by Federal Express:

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By: _____
Keith R. Jewell

Dated: November 16, 2011